BORA LASKIN LAW LIBRARY
3 1761 09233698 1

INTRODUCTION TO LEGAL THEORY

PROFESSOR JENNIFER NEDELSKY

FALL 1987

K
487
L2
N42
1987

LAW LIBRARY

SEP 9 1987

FACULTY OF LAW
UNIVERSITY OF TORONTO

FACULTY OF LAW LIBRARY
UNIVERSITY OF TORONTO

INTRODUCTION TO LEGAL THEORY

PROFESSOR JENNIFER NEDELSKY

FALL 1987

This course is intended to introduce students to important debates in contemporary legal theory. The course is in part structured around the question of why legal theory has become so important, what are the dilemmas that have pushed every major law school in North America into debates over legal theory. The very meaning and nature of law is increasingly contested. We will examine those contests in both the arguments that are currently most pressing and in the earlier theories that have shaped the terms of contemporary debate. Students will be given an introduction to the basic issues in philosophy and political theory that have come to be a central part of legal theory, again with the emphasis on why these questions are important for an understanding of what law is, can, or should be.

The dominant mode of legal thought in the common law world consists of variants of liberal legal theory. We will, accordingly, spend several weeks on some of the most important debates among these variants. There have also been increasingly important challenges to liberalism as an adequate foundation for either legal or political theory. We will look at some of those challenges both in the literature about law and in the philosophical debates. We will always begin our inquiry with arguments about law as such. But it will quickly become apparent that the most important arguments about what law is or should be rest on deeper arguments about the nature of self and society and about how we know things. We will move back and forth between debates internal to liberal legal theory and challenges to this dominant theory, and also between legal theory and the more basic philosophical issues underlying these debates.

REQUIREMENTS:

This course is genuinely an introduction. It assumes no prior knowledge of legal theory or philosophy. I have selected the readings on the basis of their intrinsic interest, their representativeness or their influence on important debates, and their accessibility. None of the readings is simple, but each is accessible if read carefully. I have, accordingly, kept the total pages assigned to a moderate number. But it is essential that you read them closely and carefully. If you see there are only twenty pages assigned for a given class, please do not allot only twenty minutes for reading them. I have included the footnotes to all the articles because I think they provide a good sense of the academic context in which articles are written. They also provide a bibliographic guide to related materials. As such they are part of an introduction to legal theory. In general, however, you need not treat them as required reading (which further reduces the number of pages assigned).

Most of each class will be a discussion of the assigned reading. It will be extremely difficult, if not impossible to get anything out of the class if you have not done the reading.

Students will be required to write six one page "comments" on the readings. You will be assigned to three different weeks for which the "comments" are due. (If you are assigned to a week in which there is only one reading for both days, you may either write a separate comment for each day or one two page comment.) The "comments" are due at Noon in Rm 342, Flavelle on the day of the class.

READINGS:

All the readings are contained in the casebook on sale in the bookroom and in Liberalism and its Critics, Michael Sandel, ed. available at the University bookstore.

EVALUATION:

Six one-page comments (15%) AND

OPTION 1: 5 page midterm paper (25%) or 48-hour take-home due Monday, October 19 and final 10 page paper or 72 hour take-home (60%) due Noon, January 11 in room 342 Flavelle.

OR

OPTION 2: final 15 page paper or 72 hour take-home exam (85%) due Noon, January 11 in room 342 Flavelle.

There will be no penalty, as such, for exceeding the page limits for the papers. However, clarity and conciseness of the argument will be an important factor in the grading. A tightly argued paper will get a better grade than a long, diffuse one that takes twice as long to make the same points.

Late papers will be penalized one third of a grade if the paper is turned in one or two days late, two-thirds of a grade if it is 3 or 4 days late, a full grade if the paper is turned in on the fifth or sixth day after the deadline. Each day, including Saturday and Sunday, counts as one day. After the sixth day, law students will be referred to the Course Approval Committee if they need an additional extension.

WEEK 1. INTRODUCTION

WEEKS 2 and 3. We begin with a classic debate in which we see a liberal defense of individual freedom contrasted with an insistence that not just individual rights, but the nature of society must be taken into account when considering the proper scope of the law. The Hart-Devlin debate reveals

some of the great strengths, as well as the weaknesses of liberal legal theory. It also provides an interesting comparison with the recurrence of this debate as a central issue in contemporary criticisms of liberal legal and political theory (by critics who would feel relatively little affinity with Devlin). Catherine MacKinnon's essay, on the other hand, is an example of the ways that some contemporary critics try to fundamentally transform the way legal arguments have traditionally been conceived.

In reading these essays (and all the readings for this course) you should first try to understand what the author is trying to argue and to see what is valuable about it. Then you should contrast the opposing arguments and begin to form a judgement about which you find more useful and persuasive.

MONDAY, Sept. 14. Devlin, Patrick, The Enforcement of Morals. Toronto: Oxford University Press, 1965 Preface, Ch. 1. pp.1-25.

Thursday, Sept. 17. Hart, H.L.A., Law, Liberty and Morality. Stanford: Stanford University Press, 1966. pp.1-52.

Monday, Sept. 21. Devlin, Patrick, The Enforcement of Morals. Toronto: Oxford University Press, 1965. Ch. VII, pp. 124-139.

Thursday, Sept. 24 MacKinnon, Catharine A., "Not a Moral Issue," in Feminism Unmodified: Discourses on Life and Law. Cambridge: Harvard University Press, 1987. pp. 146-162.

Weeks 4, 5 and 6.

In the following weeks we will be moving back and forth between debates within the dominant liberal tradition of legal theory and the increasingly important attempts to step outside that tradition. We begin with three liberal thinkers who have been influential in the debates over the true nature of the law: Hart, Fuller, and Dworkin.

WEEK 4

Monday,
Sept. 28. Hart,H.L.A., "Positivism and the Separation of Law and Morals" in Feinberg, Joel and Gross, Hyman, Philosophy of Law. Belmond: Wadsworth Publishing Co., 1986. pp. 69-87.

Thursday, Oct. 1 Fuller, Lon L., "Positivism and Fidelity to Law - A Reply to Professor Hart," in Feinberg, Joel and Gross, Hyman, Philosophy of Law. Belmond: Wadsworth Publishing Co., 1986. pp. 88-108.

WEEK 5

Monday, Oct. 5. Dworkin, Ronald, "Hard Cases" in Taking Rights Seriously. Cambridge: Harvard University Press, 1978, pp. 81-130. (We will be spending both classes on the essay, but you should have read it all by Monday.)

Thursday Oct 8. Dworkin, Ronald, "Hard Cases".

WEEK 6. We now move to a critique of the liberal tradition of legal thought. Gary Peller provides an example of the Critical Legal Studies attempt to challenge not just the particular conclusions of liberal legal thought, but its whole mode of analysis. Peller asks us to reconsider the way we think about law (and everything else). As you read, consider the nature of the challenge he poses to the theorists we have read so far. We will be returning to the rest of Peller's article later.

Monday, Oct. 12. Thanksgiving.

Thursday, Oct. 15 Peller, Gary, "The Metaphysics of American Law". 73 California Law Review 1151 (1985). pp. 1159-1191.

WEEK 7. We now return to another important debate within liberal legal theory: the debate between rights-based theorists and utilitarians. Mill is one of the most important utility theorists (although also probably the most rights-like utilitarian.) This debate continues to be of great importance since almost all approaches to law that take some notion of collective welfare as their objective (law and economics, for example) rely on utilitarian assumptions.

Midterm paper for Option 1 due.

Monday, Oct. 19. John Stuart Mill, "On the Connection Between Justice and Utility," Ch. 5 of Utilitarianism.

Thursday, Oct 22. John Rawls, "The Right and the Good Contrasted", excerpts from A theory of Justice in Sandel, Liberalism and its Critics. pp. 37-59.

WEEK 8. This week we look at two very different contrasts with Rawls' version of liberalism. Sandel says that the rights theorists have now won the argument with the utilitarians, and that we need to move beyond that argument to a more fundamental challenge to liberal thinking. Hayek (who does not address Rawls directly in this piece) argues for what he sees as the true liberal position, undistorted by wrong-headed concerns with distributive justice. Hayek argues elsewhere (see the excerpt in Sandel) directly against distributive justice. In the piece assigned for this week, he makes explicit the vision of the law that his version of liberalism requires. It is a clear statement of the conception of the law underlying many liberal rights theories.

Monday, Oct. 26. Michael Sandel, Introduction to Liberalism and its Critics pp. 1-12 and "Justice and the Good". pp. 159-176

Thursday, Oct. 29 Hayek, Friedrich A., "Introduction," pp. 1-7, and "Nomos," pp. 94-122 in Law Legislation and Liberty. Volume 1, Rules and Order. Chicago: University of Chicago Press, 1973. pp. 1-123.

WEEK 9. We now turn back from the abstract theoretical debates about the foundations of liberal legal theory, to analyses of legal thought itself. Sugarman's piece can be read as a challenge to the Hayakian vision of the law. This article also has the virtue that it grounds legal theory in a specific historical context. Ideas and debates over them do not exist in a vacuum. Sugarman presents an argument about why English legal theory developed as it did. The next section of Peller's argument applies his theoretical perspective to specific developments in American legal thought.

Monday, Nov. 2. Sugarman, David, "The Common Law Mind and the Making of the Textbook Tradition" (excerpts) in: W. Twining (ed.), Legal Theory and Common Law, Blackwell, Oxford, 1986.

Peller, pp. 1191-1219.

Thursday, Nov. 5. Peller, Gary. pp. 1219-1259.

WEEK 10. So far we have seen a range of debates within and about liberal theory and its implication for the law. By now you have some sense of the basic assumptions (and disagreements over them) that underlie debates over the nature, function and possibilities of the law. It is time, therefore, to turn to perhaps the most important expositor of the conception of rights and the individual that underlies most of liberal theory: Kant. Kant's vision of the individual is that which is assumed by most liberal theory, and that which is the basic subject of attack by those who intend to challenge the foundations of liberal theory.

Monday, Nov. 9. Kant, Foundations of the Metaphysics of Morals (selections, as edited by Alan Brudner). pp. 143-156

Thursday, Nov. 12. Weinrib, Ernest J., "Law as a Kantian Idea of Reason" 87 Columbia Law Review, pp. 472-491 (excerpts).

WEEK 11. If Kant is the philosopher who provides the foundation for much of liberal theory, Hegel is one of the great thinkers who many critics of liberal theory see as providing an alternative foundation for political, moral and legal theory. Charles Taylor is one of the most important and lucid of the Hegel scholars.

Monday, Nov. 16. Charles Taylor, "Hegel: History and Politics," excerpts from Hegel in Sandel, pp. 177-199.

Thursday, Nov. 19 Taylor, Hegel. Weinrib, "Law as a Kantian Idea of Reason," pp. 500-508. Compare Hegel and Kant, and the defense and critiques of Kantian legal theory.

WEEK 12. We return now contemporary legal theory. Peter Gabel's essay is a particularly interesting example of Critical Legal Scholars' efforts to understand law in a completely different way. His arguments will sound quite strange. Try to read the essay sympathetically, and I think you will find that it is comprehensible even though unfamiliar. When you first read it, don't worry about unfamiliar terms; just try to see what he's getting at. Try to participate with him in his efforts to rethink, reimagine what lies behind the concept of rights.

Monday, Nov. 23. Peter Gabel, "The Phenomonology of Rights Consciousness and the Pact of the Withdrawn Selves". Sections I-IV, pp. 1563-1586.

Thursday, Nov 26. Gabel, pp. 1586-1599 and
David Trubek, "Where the Action is...," pp. 575-579, 610-622. Trubek offers a statement and critique of the objectives of Critical Legal Studies.

WEEKS 13 AND 14. Critiques of liberal theory now constitute a sizeable academic industry in both legal and political theory. Liberal theory continues, however, to be dominant in both fields, as well as in the less self-conscious thought of politicians, lawyers, and judges. One of the reason defenders of liberal theory offer for being unmoved by the criticisms is that they don't see any real alternative offered by the critics. Liberal theory has, of course, been around and elaborated upon for several centuries. It is not surprising that contemporary critics have not yet developed a full blown alternative. One of the most promising prospects for such an alternative is, however, provided by feminist theory. We conclude with a glimpse at those prospects and with a paper that explores some of the difficulties in substituting a popular feminist concept "an ethic of care" for the long standing basis for political and legal theory, an "ethic of justice."

WEEK 13

Monday, Nov. 30. Scales, Ann C., "The Emergence of Feminist Jurisprudence: An Essay." pp. 1373-1403.

Thursday, Dec. 3. Gilligan, Carol, In a Different Voice. Psychological Theory and Women's Development. Cambridge: Harvard University Press, 1982.
"Reply to critics," Signs Volume 2, pp. 324-333.

Monday, Dec 7, Tronto, Joan C. "Beyond Gender Difference to a Theory of Care" in Signs, Vol. 12, No. 4. (1987). pp. 644-663.

Thursday, Dec. 10 MacKinnon, Catherine, "Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence," (conclusion) 8 Signs 635 (1982).